90-363

(1)

No.

Supreme Court, U.S.
FILED
AUG 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1990

CARLOS LUNA,
PETITIONER,

v.

SUPERIOR COURT OF THE
COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT,

Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

WILLIE J. DAVIS
DAVIS & ROBINSON
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(617) 542-8706

QUESTION PRESENTED

Did the filing of an affidavit pursuant to an order of the court constitute a knowing and voluntary waiver of the privilege against self-incrimination so as to permit that court to compel the affiant, who has now been indicted for perjury arising out of the same transaction, to appear and give testimony during the trial of a defendant charged with the crime of murder?

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CARLOS LUNA,
Petitioner,

v.

SUPERIOR COURT OF THE
COMMONWEALTH OF MASSACHUSETTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

The petitioner, Carlos Luna, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Judicial Court of Massachusetts, described below.

OPINION BELOW

The opinion of the Supreme Judicial Court of Massachusetts. decided June 27, 1990, is reported at 407 Mass. 747 (1990). A copy thereof appears in the Appendix hereto.

JURISDICTION

The Judgment of the Supreme Judicial Court of Massachusetts was entered on June 27, 1990. The Petition for Certiorari was filed within sixty (60) days of that date. The court's jurisdiction is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION

Amendment 5

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the

land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

General Laws of Massachusetts, Chapter 211, §3

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section three C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

STATEMENT OF THE CASE

The petitioner, Carlos Luna, hereinafter Luna) filed a petition under G.L.c. 211, §3 with the Single Justice of the Supreme Judicial Court seeking to vacate an order of the Superior Court compelling him to give testimony during a hearing on a Renewed Motion To Dismiss in the case of Commonwealth v. Albert Lewin. After hearing, the petition was denied. Thereafter, Luna returned to the Superior Court, and pursuant to the order, gave testimony.

A second petition under G.L.c. 211, §3 was filed seeking to void another order of the Superior Court compelling Luna to appear and give testimony at the upcoming trial of the Lewin case. After hearing, the Single Justice, issued a Memorandum

and Order denying relief. Judgment was entered in accordance with the Memorandum and Order. Luna filed a Notice of Appeal.

Before the Full Bench of the Supreme Judicial Court the cases were consolidated. They were also expedited for hearing. On June 27, 1990 the judgment of the Full Bench entered affirming the orders of the Single Justice.

The pertinent facts are as follows:

On February 18, 1988, Luna, a Boston Police Officer assigned to the Drug Control Unit, Squad Five, made application for a search warrant to search premises located at 102 Bellevue Street in the Dorchester Section of the City of Boston. In the application, made under

oath, certain statements concerning the source of his information were made. When the warrant was about to be executed, Detective Sherman Griffiths, Luna's partner, was killed. Albert Lewin was arrested and charged with murder. Lewin is a black man from Jamaica who stands more than six feet tall. In the affidavit executed by Luna, the drug dealer in the apartment was described as an Hispanic male called "Stevie", who stood approximately five feet, six inches tall.

At the Lewin probable cause hearing, civilian witnesses testified that Lewin was the occupant of the third-floor apartment at 104 Bellevue Street, and that he dealt drugs from the location.

In the affidavit executed by Luna to obtain the search warrant, he stated that

the information about drug dealing in the apartment initially came from an informant. Following indictment, Lewin filed a motion to compel the Commonwealth to produce the informant. The motion was allowed. The informant, however, was never produced.

Lewin filed a motion to dismiss the indictment based upon the failure of the Commonwealth to produce the informant. An evidentiary hearing was held in which several police officers testified as to their inability to find the informant. Luna was one of the officers.

The Court (Grabau, J.) allowed Lewin's motion to dismiss. Thereafter, the Commonwealth sought reconsideration. In support of the request the Commonwealth filed with the court an affidavit of Luna and two other officers. The affidavit filed by Luna commenced by saying, "1. This affidavit is being prepared pursuant to Judge Charles Grabau's Order of February 27, 1989." Thereafter, the affidavit contradicted some of the statements made under oath in the application for the search warrant.

After Luna's affidavit was filed, no further evidentiary hearings were held. However, on March 20, 1989, counsel for

Luna[1] appeared before Judge Grabau and the following occurred:

THE COURT: Mr. Sullivan, you have filed an apperance for purposes of this hearing only, correct, Sir, at my direction?

MR. SULLIVAN: Yes, Your Honor.

THE COURT: I have made inquiry of Mr. Muse who is still in the courtroom regarding his representations and you represented Carlos Luna; correct?

MR. SULLIVAN: Yes, Your Honor.

THE COURT: Did you advise him as to the possible consequences or repercussions of submitting an affidavit to this Court?

MR. SULLIVAN: Yes, I did, Your Honor.

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[1] Counsel for Luna at that time is not the same counsel representing him in these proceedings.

THE COURT: I do not want to breach any confidentiality you may have with your client, but is it your expectation -- can you give me any indication of whether or not Luna is expected to testify and subject himself to what I would imagine, assuming there were a trial, a vigorous cross-examination, not only relating to this case, but to other statements he made regarding other search warrants, falsification of police reports and those other matters? Can you give me any assurance that he will subject himself to examination and waive his Fifth Amendment right of self-incrimination?

MR. SULLIVAN: Your Honor, that is a matter I have spoken with him about. At

the time of our conversation, I indicated to him that it's not within our control as to whether the Commonwealth or Mr. Stern for the defense will be subpoenaing him to trial.

THE COURT: Assuming there's a trial and Mr. O'Meara doesn't call him, I am certain Mr. Stern will.

MR. SULLIVAN: Certainly that's something beyond the witness's control. He has has indicated to me that it is his intention to testify at a trial and subject himself to cross-examination.

THE COURT: Thank you. That's all I wanted you

> here for. Thank you, Sir.

Transcript of 3/20/89 hearing, pp. 39-40.

Notwithstanding the affidavits filed by Luna and the officers, Judge Grabau refused to rescind the order of dismissal. The Commonwealth appealed the decision and the Sumpreme Judicial Court reversed. Commonwealth v. Lewin, 405 Mass. 566 (1989), 542 N.E.2d 275.

The Supreme Judicial Court decided the Lewin case on August 14, 1989. On December 12, 1989 Lewin filed a renewed motion to dismiss. He stated therein, "Defendant requests an evidentiary hearing on the issue of whether the District Attorney's Office or the homicide investigators were involved in the police perjury and cover-up." Luna was subpoenaed to testify at the hearing which

was scheduled for January 8, 1990. Luna filed a motion to dismiss the summons which was denied. Lewin filed a motion to compel the testimony of Luna which was allowed.

Luna was placed on the stand and, pursuant to the advice of counsel, asserted the privileges secured by the Fifth Amendment and Article XII. The Court (Irwin, J.) reasoned that Luna waived his Fifth Amendment privilege by submitting the previously-described affidavit, and that he could be compelled to answer questions concerning the affidavit.

Luna then sought relief before the Single Justice of the Supreme Judicial Court when he filed a petition pursuant to G.L.c. 211, §3. The petition was denied.

Luna filed a notice of appeal, and moved for a stay. The request for stay was denied. Thereafter, Luna returned to the Superior Court, and pursuant to the Order of the Court, testified at the hearing on Lewin's renewed motion to dismiss.

On February 15, 1990 the Attorney General caused a special grand jury to return eight (8) indictments against Luna alleging perjury and the filing of false statements. All of the indictments emanated from the Lewin case.

On February 26, 1990 Luna appeared before Judge Irwin in the Superior Court and, for the record, stated that if called as a witness during the Lewin trial, he would assert the privilege against self-incrimination, both under the Fifth Amendment to the Constitution of the

United States and Article XII of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts. Thereafter, Judge Irwin ruled that Luna could not assert the privilege; that it had been waived.

REASONS FOR GRANTING THE WRIT

THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, THE HIGHEST COURT OF THE COMMONWEALTH,HAS DECIDED A MOST IMPORTANT QUESTION OF FIFTH AMENDMENT JURISPRUDENCE IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, AND WHICH WILL RESULT IN IRREPARABLE HARM TO PETITIONER IF NOT CORRECTED. ACCORDINGLY, REVIEW BY THIS COURT IS WARRANTED.

The record reflects that a judge of the Superior Court of the Commonwealth of Massachusetts ordered petitioner to file an affidavit in support of a motion for reconsideration of dismissal of an indictment charging murder. While that

judge expressed some doubt about the propriety of the order, he, nevertheless, issued it. More importantly, petitioner was not before the court at that time. Nor was counsel.

The record further reflects that the petitioner was provided counsel by the union, and the matter of executing an affidavit was discussed over a period of several days. While petitioner felt that he would be, "cutting his head off" by executing the affidavit, he nevertheless did so because he was told, after days of pressure and coercion, that if he did not do so the murder case against the man who shot his partner would be lost forever and that he would be blamed for it. Moreover, he was told that the family of his slain partner would not look favorably

upon him if the case were finally dismissed because of his (petitioner's) failure to execute the affidavit.

The record also reflects that then counsel for petitioner appeared before the Superior Court and made representations about petitioner's understanding of the consequences of his act in executing the affidavit.

It is upon these facts that the Supreme Judicial Court concluded that there was a knowing and intelligent waiver of the Fifth Amendment Privilege. This conclusion was reached notwithstanding the fact that petitioner was now under indictment for perjury arising out of the murder case, and that at least one of the indictments concerned the affidavit.

This Court has held that any waiver of the Fifth Amendment Privilege must be strictly voluntary, free of intimidation and coercion; and, that such waiver must be made with full awareness of the nature of the right and the consequences of the decision to abandon it. Colorado v. Spring, 479 U.S. 564 (1987); Moran v. Burbine, 475 U.S. 412 (1986). A waiver of this valued right is not lightly to be inferred. Smith v. United States, 337 U.S. 137 (1949). Moreover, any conclusion that a waiver is voluntary, "must appear from the record with unmistakable clarity." Sims v. Georgia, 385 U.S. 538, 544 (1967). In the instant case, none of these decisions were adhered to by the Supreme Judicial Court of Massachusetts.

Nothing appears to indicate that petitioner freely and voluntarily waived any rights by filing the affidavit. On the contrary, as it appears in the first paragraph of the affidavit, petitioner was doing so pursuant to an order of the court.

Petitioner never appeared before the Superior Court in connection with the affidavit. Nowhere does it appear that he was fully aware of the consequences of filing the affidavit, i.e., that he could be indicted for perjury. Indeed, the contrary appears to be true. If he did not execute the affidavit the murder case could not be reinstated and it would be his fault.

To be sure, then counsel appeared before the Superior Court and made

representation that he had advised petitioner of possible conse ences and repercussions. But this is not enough to show a waiver. Indeed, the Fifth Amendment privilege is personal. Couch v. United States, 409 U.S. 322, 327 (1973). In this instance it is personal to the petitioner, and no representation of counsel is sufficient to waive it.

The Fifth Amendment privilege is of such importance that, "Courts bear a special responsibility to be careful in evaluating claims that [witnesses] have waived important constitutional rights, even where those [witnesses] are represented by counsel." United States v. Christian, 571 F.2d 64, 68-69 (1st Cir. 1978). Therefore, at the very least, before it could be said that petitioner

waived any right by filing the affidavit, he should have been brought personally before the court for a hearing. This did not occur.

Today, police officers around the country are being targeted for prosecutions, both state and federal. Therefore, the question here presented takes on added significance far beyond this individual police officer. It is just as important as the questions presented in Garrity v. New Jersey, 385 U.S. 493 (1967) and Gardner v. Broderick, 392 U.S. 273 (1968). Accordingly, review is warranted.

CONCLUSION

For the reasons stated above, the pertitioner respectfully requests that certiorari be granted and the case set

down for briefing and oral argument; or, in the alternative, that certiorari be summarily granted.

Respectfully submitted.

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APPENDIX A

S-5320 S.J.C.
S-5326

CARLOS LUNA vs. SUPERIOR COURT

Suffolk. April 2, 1990 - June 27, 1990

Present: Liacos, C.J., Nolan, Lynch & O'Connor, JJ.

Moot Question. Constitutional Law, Self-incrimination. Witness, Self-incrimination. Waiver.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on January 9, 1990.

The case was heard by Wilkins, J.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on February 27, 1990.

The case was heard by Greaney, J.

Willie J. Davis for the petitioner.
Max D. Stern (Patricia Garin with him) for Albert Lewin, intervener.
Tobin N. Harvey, Deputy Attorney General (Jill S. Plancher, Assistant Attorney General, with him) for the Attorney General, amicus curiae.

LYNCH, J. Detective Carlos Luna of

the Boston police department (petitioner) appeals from successive denials by single justices of this court of his petitions under G.L.c. 211, §3 (1988 ed.), seeking relief from the orders of a Superior Court judge compelling him to testify in connection with criminal proceedings against Albert Lewin. In both cases the petitioner asserted that the orders would violate his privilege against self-incrimination under the Fifth Amendment to the United States Constitution and Art. 12 of the Massachusetts Declaration of Rights. A single justice first declined to set aside the judge's allowance of Lewin's motion to compel the petitioner to testify at the hearing on Lewin's renewed motion to dismiss (SJC No. 5320). Thereafter,

another single justice declined to set aside the judge's ruling that the petitioner could be compelled to testify at Lewin's trial (SJC No. 5326). Because the petitioner has already given testimony in connection with Lewin's renewed motion to dismiss, the question raised in SJC No. 5320 is moot. We affirm the single justice's decision in SJC No. 5326, that the petitioner can be compelled to testify at Lewin's trial.

Commonwealth v. Lewin, 405 Mass. 566 (1989), provides a detailed chronology of the underlying facts in this case. That decision followed dismissal in the Superior Court of a murder indictment against Lewin on the ground that the Commonwealth had failed to produce a confidential informant purportedly relied

upon by the police department. The Commonwealth moved for reconsideration of the order of dismissal and represented to the court that the petitioner's previous statements concerning the informant had been inaccurate in several respects. The petitioner filed an affidavit setting forth a revised version of the events in compliance with the judge's order. This court reinstated the indictment on appeal. Id. at 588.

Lewin filed another motion to dismiss in the Superior Court and moved that the petitioner be compelled to testify. The judge granted Lewin's motion to compel the petitioner's testimony only to permit cross-examination of the petitioner concerning the facts asserted in his affidavit. The petitioner invoked his

State and Federal privilege against self-incrimination, and the judge ruled that he had waived his privilege with respect to matters discussed in his affidavit. The single justice denied the petitioner's subsequent petition for relief under G.L.c. 211, §3, and refused to grant a stay pending appeal.

The petitioner thereafter testified for two days in connection with Lewin's renewed motion to dismiss. The judge observed that, "Luna's testimony far exceeded the limited scope this court prescribed in its . . . decision [granting Lewin's motion to compel Luna to testify]," and that Luna testified "comprehensively and fully" in connection with the renewed motion to dismiss.

In accordance with an agreement of the parties to avoid delaying Lewin's trial, the petitioner has appeared in Superior Court and stated that, if called as a witness, he would invoke his privilege against self-incrimination. The The judge ruled that the petitioner had waived the privilege and ordered him to appear and give testimony at trial. The petitioner sought relief under G.L.c. 211, §3, and a single justice denied his petition.

1. SJC No. 5320. After the single justice denied his first petition for relief under G.L.c. 211, §3, the petitioner filed a notice of appeal. He then returned to the Superior Court and testified fully, without objection as to the scope of the examination. Therefore,

the appeal of the order compelling him to testify at the hearing on Luna's renewed motion to dismiss is moot. See, e.g., Lockhardt v. Attorney Gen., 390 Mass. 780, 784 (1984); Silverman's Liquor Mart, Inc. v. Licensing Bd. for Boston, 348 Mass. 524, 530-531 (1965). There is no longer a live controversy concerning the petitioner's testimony at that hearing.

The petitioner contends that the issue is not moot because he is under indictment for perjury and related offenses and fears that the Commonwealth may seek to use his compelled testimony in the criminal proceedings against him. We do not agree.

Any dispute regarding the use of the petitioner's testimony in the criminal proceedings against him may be litigated

and appealed, as part of those proceedings.

2. SJC No. 5326.[1] Decisions of a single justice will not be disturbed on appeal absent clear error of law or abuse of discretion. See, e.g., Fogarty v. Commonwealth, 406 Mass. 103, 106 (1989). Neither is present here.

The single justice ruled that there was a sufficient basis in the record to

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[1] As the single justice observed in his memorandum and order, pretrial determinations are not normally made on the issue whether potential witnesses may invoke their privilege against self-incrimination if they are called at trial. In most instances decisions of this sort are not made until a given witness refuses to testify and a judgment of contempt is entered. Such a judgment is subject to immediate appeal as a final judgment and, if necessary, the judgement can be stayed while any such appeal is expedited. In the circumstances of this case, however, where a long and complex trial is likely, the judge's attempts to clear away certain issues in advance were not improper.

conclude that the petitioner waived his privilege against self-incrimination when he voluntarily submitted an affidavit in conjunction with the Commonwealth's motion for reconsideration of the dismissal of the indictment, and that the petitioner's waiver extends to his testimony at trial. We agree.

"It has long been the law in Massachusetts that if an ordinary witness, not a party to a cause, voluntarily testifies to a fact of an incriminating nature, he waives his privilege as to subsequent questions seeking related facts." Taylor v. Commonwealth, 369 Mass. 183, 189 (1975). The record in this case provides ample basis upon which to conclude that the testimony contained in the petitioner's affidavit was provided

voluntarily. During the hearing of February 27, 1989, at which the petitioner's affidavit was directed, the judge stated "I'm not sure how an order could force [him] to inculpate further. [He] could simply take the Fifth Amendment." Despite this statement the petitioner chose to file his affidavit.

The petitioner's subsequent testimony in connection with Lewin's renewed motion to dismiss confirms that he wanted to make a full disclosure of his previous conduct. As noted above, the petitioner's testimony occupied two days and was comprehensive. Moreover, the petitioner specifically testified that he had numerous meetings with his attorney[2] to decide whether to submit an affidavit.

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[2] Not counsel on the present appeal.

He testified that he knew that by filing the affidavit he was "cutting [his] head off," but that such was necessary if the indictment was to be reinstated.

This case is significantly different from Commonwealth v. Borans, 388 Mass. 453 (1983), and Palaza v. Superior Court, 393 Mass. 1001 (1984), where witnesses' waivers by testimony in earlier proceedings were held not to apply in later proceedings. As the single justice noted in his memorandum and order, the later proceedings in both Borans and Palaza were trials involving different defendants. By contrast, this case involves the continuation of the same criminal proceeding. It involves the same charges and the same defendant, Albert Lewin. See Matter of DeSaulnier (No.

2). 360 Mass. 761, 766 (1971)(waiver extends to subsequent proceeding if "proceeding in which the privilege is invoked is a probable, logical, or natural continuation or outgrowth of the proceeding . . . in which prior testimony has been given by the witness").

For these reasons we rule that the question raised in SJC No. 5320 is moot. In SJC No. 5326, we affirm the order compelling the petitioner to testify at the trial of Albert Lewin.

So ordered.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CRIMINAL ACTION
NOS. 069443-48

COMMONWEALTH

vs.

ALBERT LEWIN

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO COMPEL TESTIMONY

On Monday, February 26, 1990 the defendant, Albert Lewin requested that this court issue an order compelling Carlos Luna ("Luna") to testify at trial.[1] Luna responded under oath to defendant's motion to compel that he, under the advice of counsel, intended to invoke his privilege against self-incrimination

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[1] The trial is scheduled to begin March 28, 1990 in Greenfield Superior Court. With the agreement of counsel, this Court directs its attention to this motion at this time to avoid suspending trial in Greenfield.

pursuant to the Fifth Amendment to the United States Constitution and Article XII of the Massachusetts Declaration of Rights.

BACKGROUND

On January 9, 1990, this court order Luna to testify at a hearing on defendant's renewed motion to dismiss indictments. A single justice of the Supreme Judicial Court affirmed that order on January 10, 1990. Pursuant to the Supreme Judicial Court's Order, Luna testified on January 11, and 16, 1990.

On February 15, 1990, Luna was indicted by a Suffolk County Grand Jury for perjury, filing false written reports, conspiracy and perjury in a written statement. Arraignment is scheduled for March 5, 1990.

After hearing on February 26, 1990, the court finds that Luna waived his Fifth Amendment and Article XII rights with respect to his testimony in this case.

DECISION

A waiver by testimony extends to the same proceeding involving the same defendant. Commonwealth v. Weed, 17 Mass. App. Ct. 463, 467 (1984) (witness's waiver at grand jury proceeding and motion to suppress extended to trial; Matter of DeSaulnier (No. 2) 360 Mass. 761, 766 (1971)(waiver extends to a proceeding which is the "probable, logical, or natural continuation or outgrowth" of the proceeding in which prior testimony has been given by the witness). Compare Commonwealth v. Borans, 388 Mass.

453, 458 (1983)(defendant's waiver at grand jury or at his own trial does not constitute a waiver at trial of another).

In this case, Luna effectively waived his privilege on March 21, 1989 by submitting an affidavit which stated sufficient facts under oath that Luna had made substantial misstatements of fact. As previously found by the court, Luna's waiver of his rights extended to a hearing on defendant's renewed motion to dismiss indictments. By order of the court Luna testified extensively on January 11 and 16, 1990 as to this involvement in investigations into drug operations at 104 Bellevue Street and the shooting of Sherman Griffiths. Moreover, Luna's testimony far exceeded the limited

scope this court prescribed in its January 9, 1990 decision. Therefore, this court finds that any waiver of Luna's privilege at the pre-trial state of this case effectively extends to his testimony as a witness at trial. See Commonwealth v. Weed, supra.

ORDER

Based on the foregoing, the defendant's Motion to Compel Carlos Luna to testify at the trial is ALLOWED.

/s/ John J. Irwin, Jr.
John J. Irwin, Jr.
Justice of the Superior Court

DATED: February 26, 1990

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CRIMINAL ACTION
NOS. 069443-48

COMMONWEALTH

vs.

ALBERT LEWIN

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO COMPEL TESTIMONY

BACKGROUND

The defendant, Albert Lewin, appeared before the court on Monday, January 8, 1990 on a renewed motion to dismiss indictments. In connection with this hearing the defendant issued subpoenas to Detective Carlos Luna, Hugo Amate and Paul Schroeder. The attorney for Detective Luna brought a motion to quash the subpoena ordering his client to testify at this hearing. The court denied

the motion and Detective Luna was sworn as a witness.

On direct examination, Detective Luna invoked his privilege against self-incrimination pursuant to the Fifth Amendment to the United States Constitution and Article XII of the Massachusetts Declaration of Rights. The defendant next filed a motion to compel Detective Luna to testify.

For the following reasons, the court finds that Detective Luna waived his Fifth Amendment and Article XII rights for the limited purpose of allowing the defendant to cross-examine him with respect to facts and issues raised in his March 21, 1989 affidavit to the extent that it is relevant to the renewed motion to dismiss.

DECISION

A fundamental principle of our system of justice is a person's right to be free from self-incrimination. Commonwealth v. Borans, 388 Mass. 453, 455 (1983). A refusal to testify on Fifth Amendment grounds must be upheld unless the claimant has waived his privilege against self-incrimination. Id. at 456. "It has long been the law in Massachusetts that if an ordinary witness, not a party to a cause, voluntarily testifies to a fact of an incriminating nature he waives his privilege as to subsequent questions seeking related facts." Taylor v. Commonwealth, 369 Mass. 183, 189 (1975).

On March 21, 1989, Detective Luna submitted an affidavit which stated sufficient facts under oath that Luna had

made substantial misstatements of fact during earlier portions of this proceeding. Commonwealth v. Lewin, 405 Mass. 566, 575 (1989).[1] This court finds that this affidavit constitutes testimony which is subject to cross-examination. Matter of DeSaulnier (No. 2), 360 Mass. 761, 765, 766 (1971). This court further finds that by submitting the March 21, 1989 affidavit, Detective Luna waived any Fifth Amendment privilege concerning the details of the affidavit. Accordingly, the defendant has the right to cross-examine Detective Luna

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[1] Moreover, it should be noted that when this affidavit was executed, Luna was represented by counsel who advised him of the possible consequences of submitting the affidavit. Counsel also represented to the motion judge that Detective Luna intended to testify at any trial. Commonwealth v. Lewin, 405 Mass. 566, 575 (1989).

on this testimony. This cross-examination, however, shall be limited to "the subject matter of the questions he has answered" by the statements in the affdavit. DeSaulnier (No. 2), supra. at 766.

Detective Luna asserts that while he testified at a prior proceeding, that testimony did not constitute a waiver of Fifth Amendment rights in the present proceeding. Specifically, Detective Luna argues that he is already under a threat of prosecution for perjury and that this justifies an assertion of the privilege at this time. On the contrary, under the doctrine of waiver by testimony when a "witness has freely testified as to incriminating facts, continued testimony as to details would no longer tend to

incriminate. Requiring further disclosures in this context does not significantly endanger the interest which this privilege protects." Taylor, supra. at 190. In his cross-examination, the defendant "may range free and delve deep in order to attack the witness's credibility or present an alternative view of the facts, [but] he cannot invade the witness's protection from self-incrimination [from other potential criminal charges]." Commonwealth v. Funches, 379 Mass. 283, 292 (1979), citing Alford v. United States, 287 U.S. 687, 694 (1931). See also Palaza v. Superior Court, 393 Mass. 1001, 1002 (1984)(rescript).

ORDER

Based on the foregoing, the defendant's Motion to Compel Detective Luna to testify at the hearing on the defendant's Renewed Motion to Dismiss is GRANTED in accordance with the express limitations cited above.

John J. Irwin, Jr.
Justice of the
Superior Court

DATED: January , 1990

APPENDIX D

AFFIDAVIT OF DETECTIVE CARLOS LUNA

I, Carlos Luna, hereby depose and say:

1. This affidavit is being prepared pursuant to Judge Charles Grabau's order of February 27, 1989.

2. I was the affiant for search warrant #9395 issued at Dorchester District Court on Wednesday, February 17, 1988.

3. The information in my application for the search warrant was the result of an investigation by the members of my squad that began after February 9, 1988.

4. I returned from a one week vacation on February 15, 1988 and resumed working that evening.

5. During that shift I received information from my partner, Detective Sherman Griffiths, that our squad had supervised a controlled buy of cocaine at 102-104 Bellevue Street, Dorchester, earlier that evening.

6. I was told that the purchase was made by a person, hereinafter described as Y, who had been arrested during my vacation and who was providing information in an effort to lessen his possible punishment.

7. I was not present at the time that Y made that drug buy and I had never had any contact with him, nor did I, during this investigation.

8. On Tuesday, February 16, 1988 I participated in further investigation of the drug activity at 102-104 Bellevue Street. My partner and I conducted surveillance at that address.

9. Later that night, along with other members of my unit, we supervised another controlled buy which was made by another confidential informant hereinafter referred to as Z.

10. At the time of this transaction I entered the building at 102-104 Bellevue Street, which is a three floor, six family dwelling, with Z who walked slightly ahead of me.

11. Z went to the third floor and knocked on the door in an effort to initiate the drug transaction. At that time I was on the stairs between the second and third floors. During the course of that transaction I heard people coming up the stairs so I turned around and exited the building to avoid detection.

12. Shortly afterwards Z exited the building and handed me a small paper packet (folded in an expired lottery receipt, similar to Monday's buy) containing white powder, which I

recognized from my experience to be cocaine.

13. On Wednesday, February 17, 1988, I received a phone call from my partner, Detective Sherman Griffiths. He indicated that he was busy with other police department business and asked if I would apply for a warrant for 102-104 Bellevue Street.

14. During that conversation I confirmed the information that Detective Griffiths had given me on Monday, February 15, 1988 relative to the initiation of the investigation and the circumstances of the first controlled buy.

15. He told me that Y, who had disclosed the existence of a drug operation at 102-104 Bellevue Street and made that buy, had described the person dealing from the third floor apartment as a hispanic male, five foot, six inches tall who goes by the name of "Stevie".

16. The affidavit was prepared based upon the collective information of my squad members and included information provided by only two civilian informants, Y and Z. I substituted myself as the drug purchaser in an effort to protect the confidential informants who had helped our investigation.

17. I obtained the search warrant in the afternoon of February 17, 1988. Members of my squad and I arrived at that address that evening. Prior to executing

the warrant, I enlisted the aid of another confidential informant, X, who made a controlled drug buy to confirm that the dealer on the third floor was in operation that evening.

18. At 8:00 p.m., my squad members and I were on the third floor landing at 102-104 Bellevue Street and Officer Paul Schroeder began to attempt to knock the door down with a battering ram. We all announced ourselves as police officers. When Detective Sherman Griffiths stepped forward to use the sledge hammer, shots rang out from behind the door and I observed my partner receive a fatal gun shot wound to the face.

19. As a result of Detective Sherman Griffiths' murder, the search warrant was never successfully executed.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY.

_____
Carlos Luna

March 12, 1989

Supreme Court, U.S.
FILED
SEP 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-363

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

CARLOS LUNA,
Petitioner

v.

SUPERIOR COURT OF THE
COMMONWEALTH OF MASSACHUSETTS,
Respondent

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether petitioner, a ten-year veteran of the Boston Police Department, who, with the advice of counsel, and without invoking his Fifth Amendment privilege against self-incrimination, submitted a signed, written affidavit to the Superior Court for the Commonwealth of Massachusetts, "testified" voluntarily for purposes of the "waiver-by-testimony" doctrine.

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The Commonwealth of Massachusetts respectfully requests that the petition for writ of certiorari be denied.

OPINION BELOW

Respondent is not dissatisfied with the petitioner's citation of the opinion below.

JURISDICTION

Respondent is not dissatisfied with petitioner's statement of jurisdiction.

STATEMENT OF THE CASE

The Commonwealth adopts the facts as set forth in the opinion of the Supreme Judicial Court of Massachusetts in Commonwealth v. Lewin, 405 Mass. 566 (1989), and Luna v. Superior Court, 407 Mass. 747 (1990).

The facts relevant to the instant petition are as follows:

On February 17, 1988, petitioner, then a detective with the Drug Control Unit of the Boston Police Department, applied for and received a search warrant to search the premises of the third floor apartment of 102 Bellevue Street in Boston. In said application, sworn under the pains and penalties of perjury, petitioner stated that he had received

information concerning drug distribution at that address from a reliable informant referred to as "IT." Luna detailed that "IT" described the drug dealer as a 5'6", Hispanic man named Stevie who sold cocaine through a hole in the door of the third floor apartment at 102 Bellevue Street. Petitioner further stated that he, Luna, had purchased cocaine at that address on each of the two days preceding February 17, 1988. Commonwealth v. Lewin, 405 Mass. 566, 567-568 (1989).

During the attempted execution of the search warrant, Detective Sherman Griffiths was fatally shot. Albert Lewin, a 6'2" Jamaican man was subsequently arrested and indicted for the murder of Detective Griffiths. Id. at 568.

Prior to his execution of the affidavit which is the focus of the instant waiver-by-testimony inquiry,

petitioner testified concerning the February 17, 1988, search warrant in Court proceedings in Commonwealth v. Lewin, on two separate occasions. First, during Lewin's probable cause hearing, petitioner testified consistently with the facts stated in his application for search warrant. That is, he reiterated that he personally had purchased cocaine at 102 Bellevue Street on two occasions, and that his informant had provided information concerning the alleged Hispanic man who sold drugs at that address. Id. at 569-570.

After Lewin had been indicted, Lewin successfully moved for disclosure of the identity of the informant referred to in Luna's search warrant affidavit and production of that informant.[1/]

1/ According to Luna's search warrant, his informant had described the person selling drugs out of the third floor

(footnote continued)

When the Commonwealth failed to identify or produce the informant, Lewin moved for dismissal of the indictments. An evidentiary hearing was subsequently held on that motion. Id.

At the hearing, petitioner testified over the course of three days concerning, among other things, how and where he first met the informant "IT" (identified by petitioner at the hearing as "John"),

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(footnote continued)

apartment at 102 Bellevue Street as a 5'6" Hispanic man named Stevie.

Detective Griffiths was fatally shot during the attempted execution of the search warrant by a bullet that passed through the door of the third floor apartment at 102 Bellevue Street. There were no known eye witnesses to the shooting.

Albert Lewin, a 6'2" Jamaican man was subsequently arrested for the murder of Detective Griffiths. The asserted theory for the motions to produce and identify the informant was that the informant, who had allegedly seen a 5'6" Hispanic man named Stevie selling drugs out of 102 Bellevue Street only days before the attempted execution of the warrant, could provide exculpatory information.

his relationship with John, his attempts to locate John, and the use of John as an informant for the 102 Bellevue Street investigation and for some thirty-one other search warrants. After hearing and argument, the Superior Court (Grabau, J.) dismissed the indictments against Lewin. Id. at 570-571.

After dismissal of the indictments, the Commonwealth petitioned the court for reconsideration citing new information about the informant. Specifically, on February 27, 1989, the Commonwealth informed the court that it had discovered that petitioner's February 17, 1988, application for search warrant was false (i.e., that Luna had not personally purchased cocaine at 102 Bellevue Street and that Luna had not received any information from his alleged informant John regarding drug operations at that address), and that petitioner, his

sergeant, and possibly a third officer had given false testimony or provided false information to the court concerning the informant John (i.e., there was no informant who had either been inside the apartment or knew of a 5'6" Hispanic man named Stevie who sold drugs out of the third floor apartment of 102 Bellevue Street). The Commonwealth therefore argued that there was no unidentified or missing informant who could provide exculpatory information to the defense. The Superior Court (Grabau, J.) directed Detective Luna, among others to file affidavits. Id. at 574. The court expressly observed on the record, however, that Luna and the others might invoke the Fifth Amendment and decline to file affidavits. Luna v. Superior Court, 407 Mass. 747, 748-749 (1990).

On March 12, 1989, approximately two weeks after the court's order, Luna

executed and signed a written affidavit regarding his involvement in the investigation of 102 Bellevue Street, and his knowledge of and relationship with various informants he used at that address. In connection with the filing of that affidavit, the court (Grabau, J.) made inquiry of Luna's attorney who indicated that he had advised Luna as to the possible consequences of submitting the affidavit. Commonwealth v. Lewin, 405 Mass. at 575.

Despite the revelation of the above described new evidence concerning the informant, the Superior Court denied the prosecution's petition for reconsideration, and the Commonwealth appealed. Id. at 578.

The Supreme Judicial Court reinstated the indictments. Commonwealth v. Lewin, 405 Mass. at 588. In essence, the Supreme Judicial Court concluded that

because the record disclosed that there was no informant "John" who could provide exculpatory evidence to the defense, Lewin could receive a fair trial. Id. at 582-583.

In December, 1989, Lewin renewed his motion to dismiss the indictments citing alleged complicity on the part of the Office of the District Attorney and the Homicide Division of the Boston Police Department in the "cover up" of the informant's identity. In connection with hearings on said motion, Lewin called Luna as a witness. Petitioner, for the first time (i.e., after twice testifying orally and once testifying by submission of his March, 1989, affidavit), invoked his privilege against self-incrimination. Luna v. Superior Court, 407 Mass. at 748.

The Superior Court (Irwin, J.) ordered Luna to testify, holding that

Luna, having voluntarily submitted an affidavit under oath in which he de facto admitted to having made misstatements in an earlier portion of the proceeding then before the court, waived his privilege against self-incrimination as to the subject matter stated in his affidavit. The court accordingly ruled that Lewin was entitled to cross-examine Luna on the details of the subject matter of the March, 1989 affidavit. Id. at 748-749.

Luna filed a petition for extraordinary relief pursuant to Mass. Gen. Laws c. 211, §3 seeking to invoke the superintendency powers of the Single Justice of the Massachusetts Supreme Judicial Court over the trial court. The Single Justice (Wilkins, J.) affirmed the lower court's Order and denied the petition. Luna appealed the decision of the Single Justice to the full bench of the Supreme Judicial Court. Id.

During the pendency of the appeal, Luna was re-called as a witness in the hearing on Lewin's dismissal motion. At that juncture, Luna, represented and accompanied by counsel, neither refused to testify nor asserted his privilege as to any question. Rather, on January 11 and 16, 1990, petitioner testified and answered all questions asked by defense counsel and by the assistant district attorney. See Luna v. Superior Court, 407 Mass. at 748-749 ("The [motion] judge observed that 'Luna's testimony far exceeded the limited scope this court prescribed in its . . . decision [granting Lewin's motion to compel Luna to testify],' and that Luna testified 'comprehensively and fully' in connection with the renewed motion to dismiss.").

Lewin's renewed motion to dismiss was denied.

Thereafter, Lewin moved to compel Luna's testimony at trial. Luna informed the court that if called as a witness during the Lewin trial, he would assert the privilege against self-incrimination. Id. at 749. The Superior Court (Irwin, J.) again ruled that Luna would have to testify due to his "waiver-by-testimony" of the privilege. Luna again filed a petition for relief pursuant to Mass. Gen. Laws c. 211, §3, to the Single Justice (Greaney, J.) who denied the petition. Id. at 750. Luna appealed the Single Justice's ruling to the full bench of the Supreme Judicial Court, and moved to consolidate that appeal with his still-pending appeal from the prior Single Justice's order that he testify at the renewed motion to dismiss hearing.

The cases were consolidated before the full bench of the Supreme Judicial

Court. The Supreme Judicial Court determined that the first appeal, from the order of the Single Justice affirming Justice Irwin's order requiring Luna to testify during the hearing on Lewin's renewed motion to dismiss, was moot in light of petitioner's already having testified. Luna v. Superior Court, 407 Mass. at 749. The Supreme Judicial Court ruled that as to the second appeal, from the Superior Court's order requiring Luna to testify at the Lewin trial, Luna had voluntarily waived-by-testifying his privilege against self-incrimination by submitting the March, 1989, affidavit. Id. at 750-751.

Luna now seeks review of the judgment and opinion of the Supreme Judicial Court compelling his testimony at trial. The ground raised is the narrow issue whether, for purposes of the waiver-by-testimony doctrine, Luna

"voluntarily waived" his Fifth Amendment privilege when he executed and filed his March 12, 1989, affidavit.

REASONS FOR NOT GRANTING THE WRIT

I. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BECAUSE PRIOR DECISIONS OF THIS COURT UNIFORMLY HOLD THAT WHERE A WITNESS TESTIFIES, RATHER THAN CLAIMING THE PRIVILEGE, THAT WITNESS LOSES THE PROTECTION OF THE PRIVILEGE AND CANNOT BE SAID TO HAVE BEEN "COMPELLED" TO TESTIFY.

Under the Fifth Amendment, a witness must claim the privilege in order to be afforded its protection.[2/] "The

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2/ The Court has carved out narrow exceptions to this general principle where the threat of compulsory self-incrimination is so great as to virtually eviscerate any real choice on the part of the individual to assert the privilege. See Garner v. United States, 424 U.S. 648, 657, 658-661 (1976) (concluding that one such exception is made for coerced custodial confessions because "the circumstances of custodial interrogation deny an individual the ability freely to choose to remain silent"). In addition, the Garner Court

(footnote continued)

Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." Garner v. United States, 424 U.S. 648, 654-655 (1976), quoting United States v. Monia, 317 U.S. 424, 427 (1943) (emphasis supplied). The Garner Court explained the above-stated rule: "Only the witness

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(footnote continued)

noted two other exceptions: (1) where the threat of failing to file or filing a tax return was in itself incriminating; and (2) where police officers were told that assertion of the privilege would result in discharge. Id. No "exception" is applicable in the instant case where the only alleged interference with petitioner's decision as to whether or not to invoke his right to remain silent is petitioner's allegation that he was told (it is not indicated by whom) that if he failed to file an affidavit the case against Lewin would be dismissed.

knows whether the . . . disclosure may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege. If, instead, he discloses the information sought, any incriminations properly are viewed as not compelled." Garner v. United States, 424 U.S. at 655. Thus, this Court does not apply any "waiver" or "voluntariness" analysis where an ordinary witness testifies instead of claiming the privilege. Rather, the only relevant consideration is whether the witness invoked the privilege.

In addition, federal law is uniform that once a witness testifies about facts without invoking the privilege, he may be compelled to further testify about the details of the subject matter about which he has testified. Rogers v. United States, 340 U.S. 367, 373 (1951) (holding that where a witness testifies about an

incriminating fact "[r]equiring full disclosure of details . . . does not rest upon a further 'waiver' of the privilege against self-incrimination"); United States v. Johnson, 488 F.2d 1206, 1210 (1st Cir. 1973); United States v. Miranti, 253 F.2d 135, 139 (2d Cir. 1958); In re Neff, 206 F.2d 149, 152 (3d Cir. 1953). Where, as here, petitioner (with advice of counsel) submitted a signed affidavit to the Superior Court without invoking his privilege, the decision of the Supreme Judicial Court affirming the order of the Superior Court compelling Luna's further testimony in the same proceeding was correct.

The affidavit signed and filed by petitioner is, for purposes of Fifth Amendment analysis, the "testimony" of a witness. Thus, since petitioner submitted an affidavit instead of claiming the privilege, his petition for

writ of certiorari should be denied by "an application of the general requirement that witnesses must claim the privilege," Garner v. United States, 424 U.S. at 656, or lose its protection. Petitioner raises no claim which would entitle him to be excepted from the general rule. See n.2, supra at 14-15.

Petitioner contends, however, that the facts before the Supreme Judicial Court did not provide sufficient basis for a conclusion that he "waived" his Fifth Amendment privilege with "full awareness of the nature of the right and the consequences of the decision to abandon it." (Brief of Petitioner at 19). Thus, petitioner alleges he could not have been compelled to further testify. Petitioner's analysis, however, is fundamentally flawed both legally and factually.

First, petitioner's argument relies on inapposite cases for his contention that a witness who testifies without invoking the privilege must be found to have made a knowing and intelligent waiver of his privilege against self-incrimination before he can be compelled further to testify. The decisions of this Court make it clear that the witness's loss of the ability to rely on the privilege is not based on waiver principles. As this Court explained in Garner v. United States, 424 U.S. at 654 n.9:

> the cases do not apply a 'waiver' standard as that term was used in Johnson v. Zerbst, 304 U.S. 458 (1938), and we recently have made clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver. [citation omitted]. Moreover, it seems desirable to reserve the term "waiver" in these cases for the process by which one affirmatively renounces the protection of the privilege.

See Taylor v. Commonwealth, 369 Mass. 183, 189 (1975) ("This doctrine of 'waiver by testimony' . . . is not based on any true waiver theory at all in the usual sense of a voluntary, intelligent relinquishment of a known right"), citing Rogers v. United States, 340 U.S. at 373. Thus, petitioner's reliance on the custodial interrogation cases (Brief of Petitioner at 19) for his argument that an ordinary witness who testifies without invocation of the privilege must be found to have "voluntarily waived" the privilege is misplaced.

Second, the Supreme Judicial Court specifically found:

> the record in this case provides ample basis upon which to conclude that the testimony contained in the petitioner's affidavit was provided voluntarily. . . . The petitioner specifically testified that he had numerous meetings with his attorney to decide whether to submit an affidavit. He testified that he knew that by filing the affidavit he was

> 'cutting [his] head off,' but that such was necessary if the indictment was to be reinstated.

Luna v. Justices of the Superior Court, 407 Mass. at 750 (1990).

The record before the Supreme Judicial Court disclosed: (1) that petitioner, a ten-year veteran of the Boston Police Department, had been advised by his attorney of his rights and of the consequences of filing the affidavit by his attorney; (2) that petitioner had thrice testified before invoking the privilege; (3) that petitioner did not file his March 12, 1989, affidavit until two weeks after the court's order and thus could execute his affidavit "at leisure and with legal assistance [and] is even less subject to the psychological pressures at issue in Miranda than a witness who has been called to testify in judicial proceedings," Garner v. United States,

424 U.S. at 658; and (4) that the trial court fully understood that its order was subject to the petitioner's privilege not to testify. In short, the conclusion of the Supreme Judicial Court, that the record before it provided "ample basis" upon which to find that petitioner voluntarily submitted his March 12, 1989, affidavit, was correct.

Where, as here, petitioner wholly failed to invoke his Fifth Amendment privilege, but instead testified about incriminating facts, the decision below compelling further testimony was correct. Moreover, insofar as petitioner raises a claim that this Court should delve beyond his undisputed failure to invoke and determine whether petitioner "voluntarily" submitted his affidavit to the court, the Commonwealth contends that the Supreme Judicial Court correctly

applied well-settled federal and state law to the facts before it. There was no error.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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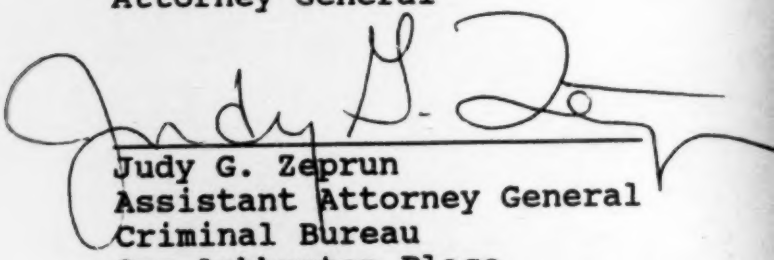

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